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In the Supreme Court of the United States

OCTOBER TERM, 1986

PETE O'SULLIVAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court below erred in affirming the district court's denial of their motion to intervene as untimely.[1]

1. In 1973, the United States commenced this lawsuit, alleging that the City of Chicago had discriminated in hiring and promoting blacks and Hispanics for its fire department (Pet. App. 2A, 1B-2B). In 1974, the parties entered into a consent decree, wherein the City agreed to "increase substantially the minority composition in the ranks of uniformed personnel within the Fire Department, so that it may become more representative of the racial and ethnic composition of the City as a whole" (*id.* at 4D). To achieve this goal, the City agreed to "adopt and seek to achieve a

[1] Petitioners also contend (Pet. 12-17) that the Equal Protection Clause prohibits a public employer from entering into a consent decree which provides for racial preferences in hiring. Because petitioners were not allowed to intervene, neither court below addressed this contention. Accordingly, the issue is not properly before this Court and we do not address it here.

goal of hiring black and Spanish surnamed individuals for at least 50% of the uniformed personnel accepted annually for entry into the Fire Department for each of the next four years" (*ibid.*; see also *id.* at 2A). This consent decree governed the City's hiring of firefighters from 1974 to 1979 (*ibid.*).

In 1978, the City began administering a written examination to applicants for firefighter positions (Pet. App. 2A). Candidates who passed that examination and a physical abilities test were placed on a ranked list—called the "8106 list"—from which firefighters were then hired (*ibid.*). The 8106 test results had an adverse impact upon minorities, however, and the United States insisted that its use was inconsistent with the long-range hiring goals established by the 1974 consent decree (*id.* at 3A). Accordingly, the parties negotiated, and on June 26, 1979, the district court approved, an "Agreed-to Injunctive Order" (Pet. App. 2A-3A, 2B), wherein the City recommitted itself to the long-range goals of the 1974 consent decree (*id.* at 3A) and promised to cease hiring from the 8106 list after July 1, 1981, or after the 500th name on the list was reached, whichever occurred first (*ibid.*).[2] As a contingency, however, the Order further provided that the City could continue to use the 8106 list after the agreed time if, but only if, it hired on a one minority-for-one white basis (*ibid.*).

Because of large hiring needs attributable to a strike, the City failed to develop a new selection procedure by the time the 500th name on the 8106 list was reached (Pet. App. 3A). Accordingly, in February 1982, the City began hiring firefighters from the 8106 list on the one minority-

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[2] By this time, the parties anticipated that the City would have developed and validated a new firefighter selection procedure and thus would be permanently to retire the 8106 list. Pet. App. 3A.

for-one white basis (*ibid.*). It continued to do so until March 1985, when it announced that a new examination had been developed and that the 8106 list was to be retired (*id.* at 3A-4A). The City further notified the 374 remaining candidates on the 8106 list, all of whom were white, that they would have to take the new test if they wished to be hired as firefighters (*id.* at 4A).

2. Petitioners, 15 white individuals who remained on the 8106 list, then moved to intervene in the district court (Pet. App. 4A). Their application alleged that the City's decision to retire the 8106 list was racially motivated and thus unconstitutionally deprived them of firefighter positions (*ibid.*). They asked the court to certify them as representatives of all white candidates on the 8106 list as of March 1985, to enjoin the City from retiring the list until all class members had been hired as firefighters, to declare the Agreed-to Injunctive Order unconstitutional, and to enter a judgment in the class's favor for one million dollars (*id.* at 4A, 4B).

The district court denied their application to intervene (Pet. App. 1B-21B).[3] It found that, insofar as petitioners sought to challenge the provisions of the 1979 Agreed-to Injunctive Order, their motion was untimely, reasoning that petitioners "knew or * * * should have known of their interest in this litigation and in the terms of the agreed order long before their current application to intervene was filed" (*id.* at 6B), that "intervention * * * at this late date * * * would undo the work which was completed six years ago, threatening the parties with the prospect of further protracted litigation" (*id.* at 7B-8B), that "the prejudice to the would-be intervenors [from] their application

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[3] Portions of two paragraphs of the district court's opinion are omitted from the appendix to the petition. See Pet. App. 10B. The two paragraphs are printed in their entirety in the addendum to this response. The material deleted from the appendix to the petition is italicized.

[being] denied [was] not so great" (*ibid.*), and that "no unusual circumstances [were] present which would weigh in favor of granting leave * * * to intervene" (*id.* at 8B).[4] And it further found that, insofar as they sought to challenge the retirement of the 8106 list, petitioners had "no right to the continued use of the 8106 List and [thus] no interest in this litigation sufficient to warrant their intervention" (*id.* at 15B).[5]

3. The court of appeals affirmed (Pet. App. 1A-15A). It held that "the only interest [petitioners] have in this lawsuit results from their assertion that they are being denied employment as firefighters on account of their race" (*id.* at 9A).[6] And it rejected arguments by petitioners and the United States that the district court had abused its discretion in finding that petitioners failed to raise this interest in a timely fashion (*id.* at 10A-14A).

Petitioners argued to the court that, while "they knew in 1979 that they would not be hired in rank order," they "did not know, and had no reason to know until the City announced the new examination, that they would not be hired *at all*" (Pet. App. 11A (emphasis in original)). But the court found that, under the terms of the Agreed-to In-

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[4] The court derived this four-part test from *Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 264-266 (5th Cir. 1977).

[5] The court also denied the motion of the Chicago Firefighters Union Local No. 2 for an order requiring the City to continue using the 8106 list (Pet. App. 15B), or to grant priority status to those remaining on the list (*id.* at 16B-18B). The Union did not appeal these rulings.

[6] The court rejected petitioners' claim that the collective bargaining agreement between the City and the firefighters' union gave them a property interest in the continued use of the 8106 list. Pet. App. 6A-8A. And it found that petitioners did not have any interest in being free from " 'arbitrary and capricious' " compliance by the City with the provisions of the Agreed-to Injunctive Order (*id.* at 9A).

junctive Order, "the City was free to discard the 8106 list as soon as it produced a new, validated examination and was bound to discard it when one-for-one hiring was no longer possible" (*ibid.*). Thus, it agreed with the district court that petitioners "had notice when the Agreed-to Injunctive Order was entered that they might not be hired on account of their race" and, accordingly, that their motion to intervene was untimely (*ibid.* (footnote omitted)).

The United States, by contrast, conceded in the court of appeals "that it [was] too late to challenge the terms of the 1979 Order and * * * that [petitioners] were on notice that the list could be struck (in favor of a new exam) at any time" (Pet. App. 12A).[7] It argued, however, "that intervention is timely on the single ground that the list [was] being retired for a racially discriminatory reason" (*ibid.*), reasoning that petitioners "could not have known until the City announced that the list was being discarded that only white candidates would remain on the list at the time it was discarded" (*ibid.*). But the court rejected this argument too, finding that "the very specific interest that the United States has isolated cannot support the weight the United States seeks to place upon it" (*ibid.*), that the "City's action in retiring the list cannot be separated from the entire remedial scheme agreed to in 1979" (*ibid.*), and that "[a]ny challenge to retiring the list because of its racial composition is of necessity a challenge to the terms of the Agreed-to Injunctive Order" (*id.* at 13A). Thus, the court held "it was no abuse of discretion for the district court to have decided that the [petitioners] knew or should have known of their interest in this lawsuit substantially before March of 1985" (*id.* at 14A).

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[7] The United States opposed intervention in the district court (Pet. App. 4A). The United States reconsidered the intervention question prior to the appeal, however. Throughout the proceedings in both courts, the United States took the position that there was no merit to petitioners' substantive claim.

Finally, the court noted its agreement with the district court's conclusion that the "balance of hardships" weighed against intervention (Pet. App. 14A) and that no " 'unusual circumstances' " militated in favor of intervention (*id.* at 15A). Accordingly, it determined that the district court had not "abused its discretion in ruling that the application to intervene was untimely" (*ibid.*).

4. Petitioners argue (Pet. 18-26) that the district court abused its discretion in finding their motion for intervention to be untimely. We agree with petitioners that, on the particular facts of this case, their motion to intervene was timely filed. But we do not believe that this narrow, fact-bound, issue warrants review by this Court.

a. In our view, petitioners simply could not have asserted their claim—that the 8106 list was being retired for racial reasons—prior to March 1985, when the City actually retired the list. To be sure, petitioners knew or should have known prior to this time that the 8106 list was based on a discriminatory selection procedure, that the Agreed-to Injunctive Order stated that hiring under it should cease after July 1, 1981, or after the 500th name was reached, whichever came first, and, in any event, that the City would be required to retire the 8106 list when it no longer could accommodate one-for-one minority hiring. As long as minorities remained on the list, however, the list could and in fact did continue to be used under the one-for-one hiring provision of the decree. Thus, petitioners had a reasonable prospect of being hired as long as the list remained in use and, accordingly, prior to March 1985 could not show that they had been discriminatorily denied an employment opportunity.[8] In short, prior to March 1985, had petitioners attempted to assert their

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[8] In 1979, when the Agreed-to Injunctive Order was entered, there were sufficient minorities on the list to ensure that, if the City had to hire from the list beyond the 500th name, white employees (such as petitioners) would still be hired. Likewise, when hiring resumed in

claim that the 8106 list could not be retired for racial reasons, the district court would have had to dismiss their application as premature and as entirely speculative in nature. Therefore, petitioners' motion to intervene, filed shortly after the City decided to withdraw the list, should have been regarded as timely filed. The contrary decision of the court below is in error.

b. Nevertheless, the decision below does not warrant review by this Court. It does not establish any new principle concerning the law of intervention. The court acknowledged that the "timeliness" question must be measured from the point at which the putative intervenors knew or should have known that the particular interest which they asserted was adversely impacted. See Pet. App. 10A. Likewise, it acknowledged that claims of discriminatory denial of employment generally constitute "interests" sufficient to support intervention. *Id.* at 9A. It simply held that, on the unique facts of this case, petitioners knew or should have known in 1979, when the Agreed-to Injunctive Order was first entered, that the 8106 list would be withdrawn when no minorities remained on it

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February 1982 following the strike, there were sufficient minorities remaining on the list to ensure that white employees such as petitioners would continue to be hired pursuant to the one-for-one hiring provision. Indeed, it appears that, until the list was retired in March 1985, petitioners could reasonably have anticipated that eventually they would be hired pursuant to the one-for-one hiring provision of the 1979 Order.

Petitioners were not hired pursuant to the one-for-one hiring provision because a disproportionate number of the minority candidates on the list either could not be located or failed background investigations or physical examinations. Pet. 8; Pet. App. 4A n.3, 4B. It does not appear that petitioners knew or reasonably should have known that the minority candidates would be dropped from the list at this disproportionate rate. Thus, there was no apparent reason to predict that the supply of minority candidates would be prematurely exhausted or that the City would retire the 8106 list before hiring petitioners.

(and therefore that they had been denied a prospective employment opportunity on the basis of race). See *id.* at 11A-14A. In our view, this uniquely factbound decision is not worthy of this Court's time and attention, particularly in light of the opportunity afforded petitioners to compete for positions on the basis of the new test (see page 3, *supra*).

It is therefore respectively submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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ADDENDUM*

This court's examination of the four factors relevant to a determination of whether an application to intervene is timely mandates a finding that insofar as the O'Sullivan applicants seek leave to intervene to challenge the agreed order, their application is untimely. Fundamentally, their contention that intervention is warranted because they have been denied employment due to their race, in that the City wants to strike the 8106 List because there are no more minority candidates remaining on the List, is a challenge to the provisions of the agreed order. The agreed order conditioned the use of the 8106 List beyond July 1, 1981, or after the 500th name on the list was reached upon the City's hiring one minority *candidate to every non-minority candidate. Thus, the agreed order contemplated use of the 8106 List, in the event it had to be used after July 1, 1981 or after the 500th name, only so long as it could accom[m]odate one-to-one hiring. By seeking to strike the list because it no longer contains qualified eligible minority candidates, the City is acting in compliance with the implicit instructions of the agreed order. Thus, to the extent the O'Sullivan applicants seek to intervene in this case because they object to the provisions of the agreed order which condition use of the 8106 List upon one-to-one hiring, their application is untimely.*

The question remains, however, whether the O'Sullivan applicants may be given leave to intervene so they can challenge the City's plan to strike the 8106 List and hire applicants from a new list on a basis other than their dissatisfaction with the agreed order. If another basis for challenging the City's plan exists, the O'Sullivan applicants have moved in a timely manner. Nevertheless, before this

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* The italicized portions of these paragraphs were omitted from the district court's opinion as set forth in the petition (Pet. App. 10B (emphasis added)).

court could grant leave to the O'Sullivan applicants to intervene in this action so they can challenge the City's proposed action, it must first determine whether the O'Sullivan applicants have an interest in the continued use of the 8106 List which would give them a right to intervene in this action or which would persuade this court to give them leave to intervene pursuant to this court's discretion. Specifically, as this court noted on April 4, 1985, this court is concerned with whether the City's "delay in implementing the consent decree and their delay in giving a new exam and creating a new list which they could have done quite legitimately in 1981 has caused [the O'Sullivan applicants] to be put in a position where they have been deprived of some genuine right." Unless the O'Sullivan applicants have a right in the continued use of the 8106 List, their intervention in this matter would serve no useful purpose and would not be warranted because the disposition of this action in their absence would not affect an interest which they have in the subject matter of the litigation.

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